Ontario Human Rights Commission

Commission ontarienne des droits de la personne

# DISCRIMINATION and AGE

## Human Rights Issues Facing Older Persons In Ontario

**Discussion Paper**

Ontario Human Rights Commission

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## Executive Summary

The purpose of this Discussion Paper is to identify trends and critical issues related to age, and to make policy and related recommendations to promote the human rights of older persons.

The Ontario Human Rights Commission's discussion paper was initiated in 1999 following designation of the UN International Year of Older Persons. The issues canvassed in this paper relate primarily to:

- Employment for persons aged 45 to 65 and over;
- Housing for persons 55 and over; and
- Services and facilities for persons over 65 years of age.

As with other forms of discrimination, the main barriers faced by older persons are attitudinal, but several important distinctions exist between age and other grounds. The first is that certain forms of age discrimination, notably those related to mandatory retirement and the restriction of human rights protections above a certain age, are generally considered acceptable. While certain aspects of the differential treatment may be reasonable and *bona fide*, others are not and are based on precisely the sorts of stereotypes that human rights law is designed to prevent. The second distinction is that discrimination against older persons appears not to generate the same degree of moral outrage as other forms of discrimination. This may in part be related to the first issue, but is also linked to long-held beliefs and assumptions about the value and worth of older persons.

This paper reviews the compelling demographic and social trends that militate in favour of significant changes to many of these attitudes and practices. The proposed strategies focus on areas where these attitudes or practices unfairly diminish access to social goods at a time of life when they may be most needed. These are especially evident in the areas of employment, housing and in goods, services and facilities.

The final section contains recommendations related to policy and operational options.

**Introduction**

The Ontario *Human Rights Code* (the "*Code*") protects against discrimination on the ground of age in relation to accommodation (housing), goods, services and facilities, employment, contracts and membership in vocational associations.

This paper deals with discrimination as it relates to the older person.[1] It has been developed as part of the Ontario Human Rights Commission's (the "Commission") mandate under s. 29 of the *Code* and the policy framework of the Policy and Education Branch to develop policy on the major grounds in the *Code*.

The year 1999 was the International Year of Older Persons. This designation by the United Nations (the "UN") was designed to recognize the contributions made by older persons and their value to society.

Based on the case law, demographic trends and the types of cases coming to the Commission through complaints, a strategic focus was adopted to ensure that the paper dealt with the most prevalent issues. Briefly summarized, these issues relate primarily to:

- Employment for persons aged 45 to 65 and over;
- Housing for persons 55 and over; and
- Services and facilities for persons over 65 years of age.

Our population is aging. It is estimated that by the year 2021 Ontario will be home to three million senior citizens, up from one and a half million in 1998[2].

As the population ages, the ability of service providers to meet the needs of older persons as well as access to appropriate facilities and housing become increasingly important. In the area of employment, the "downsizing defence" combined with rapid growth of new technologies may have a disproportionate impact on older workers. The dignity and worth of older persons are infringed by stereotypes about aging, and neglect and abuse of seniors in services and facilities have been reported in several parts of the country. For example, elder abuse in institutionalized settings is the subject of an inquiry in the Province of Quebec.

Case law and social commentary suggest that age discrimination is approached differently from other forms of discrimination. Aging is something that all individuals who do not die prematurely will eventually experience. This

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1 Discrimination and harassment issues that affect young persons are quite different and will not be considered in this paper.

2 From the Province of Ontario's International Year of Older Persons Web Site, online: Province of Ontario <http://www.gov.on.ca/mczcr/seniors/English/iyop.htm>.

distinguishes age from other "traditional" grounds that reflect characteristics that do not change throughout a person's lifetime, such as race, colour or ancestry. More important is the fact that, in many cases, age discrimination is treated as permissible on the basis it has social utility. In fact, almost 30 years ago, in a seminar sponsored by the Commission's Age Discrimination Division, the following was noted:

> *As you have doubtless observed, age discrimination does not seem to invoke the same sense of moral outrage at the community level as is the case with discrimination based on race, creed and national origin. Nevertheless, the consequences of age discrimination are no less severe in the economic sense, in the social sense and in the psychological sense. The victims are crippled in equal measure by age discrimination.*[3]

This observation still applies today despite the advent of the Canadian *Charter of Rights and Freedoms* (the "*Charter*") and the evolution of equality jurisprudence. The Commission's treatment of age discrimination complaints suggests that a similar approach is taken to this somewhat unique form of discrimination.

***The International Year of Older Persons***

The United Nations (the "UN") has identified five key areas of importance for older people:

- Independence: opportunities for employment, education or training and provision of the support required to enable older people to live at home for as long as possible.
- Participation: an active role in decision making and communicating in the family, the community and society as a whole.
- Care: access to health care based on need, and social, legal and other services that enhance personal security and provide a safe, humane and caring environment for those in residential care or a treatment facility.
- Self-fulfillment: personal development opportunities, with access to cultural, spiritual and recreational resources.
- Dignity: full human rights, including respect for older persons' beliefs, privacy and security.

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[3] Opening remarks of G.A. Brown, "The Older Worker in Today's Economy and Community", *Report of Proceedings of First Seminar on Age Discrimination and the Age Discrimination Act of Ontario* (Toronto: 4 June 1970) [unpublished].

The theme for the International Year of Older Persons, "Towards a Society for All Ages", embraces the notion of a society that adjusts to the needs and capabilities of all, thereby releasing the potential of all, for the benefit of all[4]. Like the UN, Canada has signalled the need to prepare for this important demographic change.

The theme mirrors the Preamble to the *Code,* which recognizes the dignity and worth of every person and the need to provide for equal rights and opportunities without discrimination so that each person feels a part of the community and able to contribute fully to the development and well-being of the province. As part of the commitment that follows the International Year of Older Persons, it is particularly appropriate to examine the treatment of older persons within Ontario in light of the letter and spirit of the *Code*.

Indeed, the Province of Ontario has proclaimed:

> *Ontario's 1.45 million seniors, by volunteering thousands of hours to their families and to their communities, truly make "Ontario, a Province for All Ages". Thus the Province of Ontario proclaims 1999 as The International Year of Older Persons: a year to honour our seniors and lay plans for lasting legacies that will ensure respect and recognition for our seniors in the next millennium*[5].

Consistent with this statement, and in keeping with the theme of Ontario being a "Province for All Ages", the Commission has undertaken this review of human rights issues affecting older persons. This paper considers social issues that relate to age discrimination, including the changing demographics of society, attitudes towards aging, and the evolving nature of the workplace. It examines provisions of the *Code*, human rights legislation in other Canadian jurisdictions, international human rights documents, and jurisprudence and literature that relate to age discrimination.

It is hoped that this paper will form the basis for community consultation followed by formal Public Policy which will help set the stage for an approach to human rights that will reflect and address emerging realities as well as growing needs of older persons in the 21st century.

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[4] From discussion of International Year of Older Persons 1999, online: United Nations <http://www.un.org/esa/socdev/iyop/iyopaag.htm>.

[5] From Ontario's International Year of Older Persons Web Site, *supra* note 2.

**Caseload Profile**

In 1997/1998[6] age was cited as a ground of discrimination and/or harassment in 5% of complaints received by the Commission (105 cases). The majority of age-related complaints (81) arose in the employment context, followed by goods, services and facilities (21). In the same year, two age discrimination complaints, or 2% of the complaints that were closed in that year, were sent to a Board of Inquiry. Both were in relation to the area of goods, services and facilities. This figure is consistent with the Commission's overall figure with respect to Board referrals. The majority, approximately 45%, of the employment cases were withdrawn or abandoned and 29% were dismissed by the Commission.

In 1998/1999[7] age was cited as a ground in 6% of complaints received (174) and once again most often in the employment context (134) followed by goods, services and facilities (33). Interestingly, in the context of settlements in mediated cases, cases in which age was cited as a ground of discrimination on average settled for considerably more money than cases which cited other grounds[8]. In 1998/1999, six out of 196 cases that were closed were referred to a Board of Inquiry. This represents 3% of cases, which is lower than the average for all cases disposed of in the year (4.1%).

The important difference between age and other cases is more evident in the qualitative than in the quantitative analysis. Partly because of the recognized social utility of retirement policies and partly because of the differing attitudes to age discrimination, the legal and normative approach to age discrimination appears to be less critical and rather more accepting of the practice.

**Statutory Framework and Definition of "Age"**

Section 10 of the *Code* defines "age" as eighteen years or older, except in the case of employment where "age" means an age that is eighteen years or more and less than 65 years. This means that in the area of employment, persons who are 65 years or older cannot complain of discrimination because of age. That does not, of course, preclude complaints from persons who are over 65

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[6] The statistics are based on the Ontario Human Rights Commission's Annual Report 1997/1998. Unfortunately, the available statistics do not indicate to which age groups the complainants belong. However, it is likely that the majority, at least in the employment context, are from individuals aged 45 to 65.

[7] Based on the Ontario Human Rights Commission's Annual Report 1998/1999.

[8] The average dollar value for age discrimination cases was $14,348.65; the next highest ground was handicap at $6,866.72. One possible explanation for the higher awards in age cases might be related to the difficulty older workers can have in obtaining new employment and mitigating their damages.

years of age where the allegation is of discrimination on other grounds, for example race or disability.

Age discrimination includes not only direct discrimination, but also indirect and constructive discrimination. Constructive, or adverse effect discrimination, is set out at s. 11 of the *Code*:

> *11.--(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,*
>
> *(a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or*
> *(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.*
>
> *(2) The Commission, the board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.*

There are important exceptions to the rule against age discrimination. These exceptions are discussed in detail later in this paper.

## Demographics

There is an abundance of statistical data related to senior citizens and the aging population. What follows is a discussion of demographics that are particularly relevant to human rights issues for older persons.

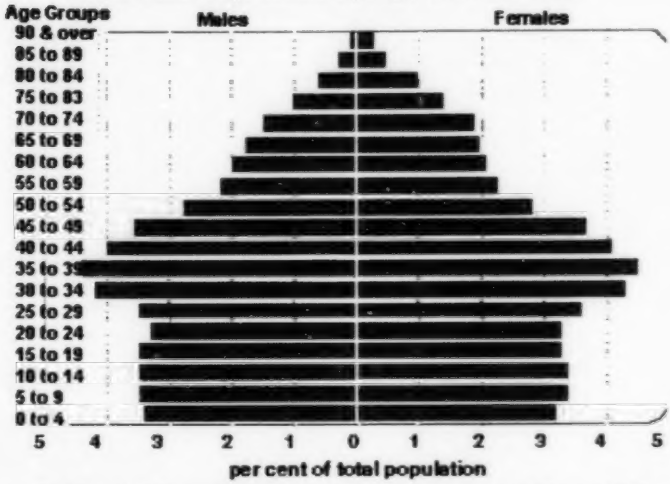
### *A Snapshot of the Aging Population*

Data from Statistics Canada indicates that in 1999, 12.4 percent of the population of Canada and 12.5 percent of the population of Ontario was 65 years of age or older[9]. The data further indicates that in 1999, 22.75 percent of the Canadian

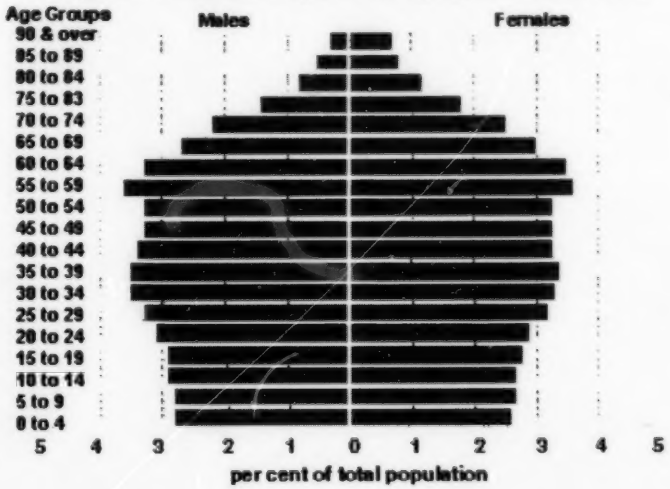
[9] Unless otherwise indicated, statistics are from the Statistics Canada Web Site, online: Statistics Canada <http://www.statcan.ca>. Most of the available statistics relate to the Canadian population and only some information has been broken down by province. However, as there is

population was between the ages of 45 and 64. Accordingly, In 1999 approximately 35 percent of the population was aged 45 or older. Over the next four decades, it is estimated that the number of Ontarians over 65 years of age will double.[10] The following charts clearly illustrate the changing composition of the Canadian population:

**Canadian Population by Age and Sex, 1996**




**Projected Canadian Population by Age and Sex, 2021**




nothing to suggest that trends in Ontario differ significantly from those in Canada, where Ontario statistics are not available, this paper uses Canadian statistics. Unless otherwise indicated, the numbers relate to Canadian population.

[10] P. Oreopoulos & F. Vaillancourt, "Taxes, Transfers, and Generations in Canada: Who Gains and Who Loses from the Demographic Transition" (Toronto: C.D. Howe Institute, June 1998), online: C.D. Howe Institute <http://www.cdhowe.org>.

Data Source: Statistics Canada, 1996 Census of Canada, Age and Sex, Cat. No. 95F0186XDB and Statistics Canada, Population Projections for Canada, Provinces and Territories Ca. No. 91-520, online: Health Canada <http://www.hc-sc.gc.ca/seniors-aines/pubs/poster/seniors/page2ehtm>.

At the same time, life expectancy continues to steadily increase. By 2021, the life expectancy for a 65-year-old is expected to have increased by about five years from 1966[11].

Canadian seniors are not a homogeneous group. At least from a broad statistical perspective, people aged 65-74 more closely resemble those in age groups under age 65 than they do those aged 85 and over, while people in the 75-84 age range appear to be in a period of transition. The population aged 85 and over, on the other hand, is the most likely to be characterized by many of the conditions associated with old age. This is particularly significant, because the population aged 85 and over is the fastest-growing segment of the overall senior population.[12] Accordingly, when discussing issues related to older persons, it is important to remember that broad generalizations and identical treatment of all persons over 65 years of age are not always appropriate.

A statistic that has implications for government fiscal policy and the structuring of government social security programs for seniors is the ratio of seniors (over age 65) to working-age Canadians (age 25-65): the 'seniors dependency ratio'. While the seniors dependency ratio has changed little from 1960 to the present day, and is expected to remain constant through 2005, it is projected to rise sharply after 2005, when the 'baby-boom' generation (those born between 1945 and 1965) begins to reach age 65[13]. This trend is significant as the majority of government transfers and purchases are made to or for Canadians age 65 or older, while the majority of taxes are paid by those of working age[14].

***Seniors' Income Levels***

On average, seniors have lower incomes than people in most other age groups. About one in five seniors in Canada lives in a low income situation. In 1997, 19% of the total Canadian population 65 and over had incomes below Statistics Canada's Low-Income Cut-offs[15]. Female seniors have significantly lower

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11 From M. Gunderson, "Flexible Retirement as an Alternative to 65 and Out" (Toronto: C.D. Howe Institute, May 1998) at 4, online: C.D. Howe Institute <http://www.cdhowe.org> [hereinafter *Flexible Retirement*] citing R.L. Brown, "Achieving Stability and Equity with Paygo Funding" *Policy Options*, September 1995 at 21.

12 *Statistical Snapshot No. 1: A Growing Population*, online: Health Canada, Division of Aging and Seniors <http://www.hc-sc.gc.ca/seniors-aines/pubs/factoids/en/factoid.htm>.

13 P. Oreopoulos & F. Vaillancourt, *supra* note 10 at 4.

14 *Ibid.* at 5.

15 *Statistical Snapshot No. 24: The Incidence of Low Income Falling*, *supra* note 12.

incomes than their male counterparts[16]. Unattached senior women experience high poverty rates. Using the Low-Income Cut-offs as a measurement of poverty, the poverty rate for unattached women over 65 was 43.4 percent in 1995[17]. In 1997 about half of senior women (49%) lived in a low income situation[18].

The last two decades have seen a decline in poverty among the elderly. Nevertheless, a large number of seniors still live below the poverty line.[19] To illustrate the financial difficulties faced by some seniors, recent figures show that the percentage of seniors in Toronto who rely on food banks has more than doubled since 1995[20].

***Seniors and the Labour Force***

An important trend in the last few decades has been the decline in the workforce participation of men aged 55-64. Between 1976 and 1995, the proportion of these men with jobs fell from 74% to 54%, although in the last few years this figure has increased slightly (to 56%). In contrast, the share of women in this age group participating in the paid workforce has increased since the mid-1970s. In 1998, 36% of 54-65 year old women were part of the paid workforce compared to 30% in 1976.[21]

Some seniors continue to participate in the paid workforce after the age of 65. In 1998, 6% of all people aged 65 and over were employed, with senior men being considerably more likely than senior women to be working outside the home. In 1998, 10% of senior men, compared with 3% of senior women, were part of the paid work force. Many employed seniors work part time (41%) and 63% of employed seniors are either self-employed or unpaid family workers.[22]

[16] For example, in 1995 Canadian women aged 55-64 had an average income of $18,078 compared to $35,628 for their male counterparts, women aged 65-74 had an average income of $16,157 compared to $28,540 for men of the same age; from The Canadian Seniors Policies and Programs Database, online: Government of Canada <http://www.sppd.gc.ca/statspack/english/income.html>.

[17] From S. Day, M. Young & N. Won, "The Civil and Political Rights of Canadian Women" *Research paper prepared for the Honourable Lois Wilson* (Spring 1999), online: Status of Women Canada <http://www.swc-cfc.gc.ca> citing National Council of Welfare, *Poverty Profile 1995* (Ottawa: Supply and Services Canada, 1997) at 85.

[18] *Statistical Snapshot No. 25: Gender Differences in Low Income*, *supra* note 12.

[19] K.K. Lee, *Urban Poverty in Canada: A Statistical Profile* (Canadian Council on Social Development: April, 1999) at 30, online: Canadian Council on Social Development <http://www.ccsd.ca>.

[20] "Rent hikes are pushing pensioners to the limit" *The Toronto Star* (29 April 2000). Rent increases and a lack of affordable housing have largely been blamed for this trend.

[21] *Statistical Snapshot No. 19: Decline in Employment Among Men Aged 55 to 64*, *supra* note 12.

[22] *Statistical Snapshot No. 18: Still on the Job*, *supra* note 12.

***Seniors and Institutions***

Contrary to misconceptions that many seniors live in institutions, the vast majority of seniors, 93% in 1996, live in a private household. In 1996, the remaining 7% lived in institutions. In 1996, 85% of all institutionalized seniors lived in special care homes for the elderly and chronically ill, while smaller numbers resided in hospitals, religious institutions or other types of institutions. Older seniors, especially older women, are most likely to live in an institution.[23]

Seniors are, however, more likely to be hospitalized than younger persons. Seniors, for example, were three times more likely than those aged 45-64 to be hospitalized in 1997. Hospitalization rates also rise substantially among older seniors, with people aged 75 and over being 70% more likely than those 65-74 to be hospitalized that year. Seniors also tend to stay in hospital for considerably longer periods than younger people.[24] As such, seniors are important consumers of hospital services.

**Stereotypes and Negative Attitudes**

Stereotypes about aging and the abilities of older persons may give rise to discriminatory treatment. For some, aging is associated with dependence and frailty and older persons are seen as a drain on employers, families, service providers and governments[25]. The fact that the proportion of seniors is increasing, combined with numerous studies and articles which discuss the potential strain on younger generations of supporting the aging population[26], creates a risk of even greater prejudice against older persons. As the newsletters of the National Advisory Council on Aging note, public discussion of population aging often focuses on aging as a problem with negative consequences to society[27].

A common problem for older persons in Western society is that of being judged incompetent or inappropriate to carry out tasks purely on the basis of age. There is a perception that older persons are unable to learn new things.[28]

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23 *Statistical Snapshot No. 12: Living in Institutions*, *supra* note 12.

24 *Statistical Snapshot No. 47: Hospitalization of Seniors*, *supra* note 12.

25 "Senior Friendly Communities" *Expression: Newsletter of the National Advisory Council on Aging*, vol. 13 no. 1 (Autumn 1999), online: Health Canada <http://www.hc-sc.gc.ca/seniors-aines/pubs/expression/expintro_e.htm>.

26 For example, a headline of a C.D. Howe Institute Communiqué states: "Younger Canadians pay more tax, receive fewer benefits, than older generations, says C.D. Howe Institute Study". This study cites empirical evidence, but sends a message about older persons being a drain on the system rather than making a point that is essentially generational.

27 "Celebrating Seniors' Contributions" *Expression: Newsletter of the National Advisory Council on Aging*, vol. 12 no. 2 (Winter 1998), *supra* note 25.

28 From "Age and retirement – educating the public sector" in *TIROHIA, Quarterly*

In our society, there is a tendency to want to compartmentalize the aging process and draw bright-line distinctions between age groups[29]. The clearest example of this is the phenomenon of turning 65. The individual wakes up on the morning of her birthday to find that she can be forced to retire from employment and has, in the eyes of society, assumed the status of an 'old' person and a 'pensioner', with all of the associated prejudices. This bright-line, categorical approach has been criticized for its arbitrariness and its failure to recognize that we will not all be equally situated physically, mentally and financially when we reach 65[30]. As the statistics show, seniors are not a homogeneous group and treating older Canadians as such is not appropriate. Unfortunately, this generalization is entrenched in the *Code* itself with respect to the fact that workers over 65 do not have the right to file a claim of age discrimination.[31] The suggested prohibition against generalization applies not just to stereotypical attitudes about older persons, but also to legitimate policies and programs designed to meet the needs of the aging population. .

**Age and Intersectionality**

As a result of the Commission's new policy work on intersectionality, it is becoming increasingly clear that human rights work has to be informed by the social realities in which people live - realities that frequently take on quantitatively new dimensions when examined through the light of intersecting or overlapping grounds.

Recognizing that persons experience discrimination in unique ways, it is difficult to isolate particular grounds or types of economic disadvantage, but demographic trends and the literature identify two particular areas that merit focus here: the two groups that stand out as experiencing unique issues based on the intersection of age with other aspects of their identity are elderly women and elderly persons who are disabled. Obviously, older women with disabilities are especially vulnerable as a result of the combined effect of advanced age, severity and occurrence of disability and the likelihood that many have not spent a lifetime in the workforce and therefore have limited income sources.

***Elderly Women***

For several reasons, including their longevity and their socio-economic status, aging has a disproportionate effect on women.

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*Newsletter of the New Zealand Human Rights Commission*, Komihana Tikanga Tangata (April 1999) at 9.

[29] C. Ford, "Bright Lines: Status, Recognition and the Elusive Nature of Ageing" (1996) 2 Appeal: Review of Current Law and Law Reform 4 at para. 2, online: QL (JOUR).

[30] *Ibid.* at para. 3.

[31] Section 10.

Women make up a relatively large proportion of seniors. In 1998, 57% of all people aged 65 and over were female, whereas women made up only 51% of those aged 55-64, and 50% or less of those in age groups below age 55. The share of the senior population accounted for by women is even higher in the older age ranges. Indeed, in 1998, women made up 70% of all persons aged 85 and older and 60% of those aged 75-84, while they made up 54% of people aged 65-74. Consistent with these statistics, among seniors, women have a considerably longer life expectancy than men.[32] They are, therefore, more likely to access social goods such as health care and nursing homes or similar institutions[33].

With respect to their socio-economic status, levels of income and labour force participation indicate that older women may face unique human rights issues. For example, many social programs which were designed at a time when the workforce was primarily male and which are neutral on their face may adversely impact on women. Old Age Security (OAS) provides a universal indexed grant to all seniors over 65 and may be supplemented by the Guaranteed Income Supplement (GIS). Full OAS and GIS benefits may assist married seniors to approach the poverty line, but for single seniors, the benefits are well below the poverty line. Since women make up a disproportionate share of senior singles, especially in the oldest groups, these programs have been unable to lift older women out of the structural poverty caused by these factors.[34]

Canada Pension Plan (CPP) benefits are tied to contributions made by workers and their employers based on a percentage of average earnings. As a result, women, who tend to work in lower-paying jobs and for a shorter period of time, receive significantly less in CPP benefits than their male counterparts[35]. Furthermore, reports indicate that the increased emphasis on private pension plans and tax-assisted savings for retirement, ie. Registered Retirement Savings Plans (RRSPs), also adversely affects women. Women tend to work in sectors where employer pension plans are not available. Moreover, they earn considerably less than men and have less discretionary income to contribute to

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32 *Statistical Snapshot No. 5: More Women Than Men, supra* note 12.

33 For example, older senior women average the longest hospital stays; *Statistical Snapshot No. 47: Hospitalization of Seniors*, *supra* note 12. Elderly women are more likely to live in institutions (see section on *Nursing Homes and Other Institutions*).

34 See F. Marzari, "Pensions, Policy and Power" (1996) 2 Appeal: Review of Current Law and Law Reform 34 at para. 1, online: QL (JOUR).

35 In 1993, women received only 58.8% of what men received as benefits under CPP/QPP; from C.F.L. Young, "Invisible Inequalities: Women, Tax & Poverty" (1995) 27 Ottawa L.R. 99, online: QL (JOUR) citing Canadian Advisory Council on the Status of Women, *Work in Progress: Tracking Women's Equality in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1994) at 44.

RRSPs[36].

While these areas are within federal jurisdiction, they have implications in the provincial sector, since community-based services and supports must be in place to "make up the difference". For example, affordable housing is likely to be of particular concern to single elderly women.

***Elderly Persons with Disabilities***

In 1991, about half of all Canadians aged sixty-five and over had a disability.[37] For persons who have had disabilities for all or most of their lives, aging aggravates chronic patterns of poverty and social discrimination, whereas persons whose disabilities appear later in life can experience sudden and devastating changes in lifestyle and living standards.[38]

The most common disabilities facing older persons are those related to mobility (74.2%) and agility (65%), followed by hearing loss (41.8%), visual impediments (26.5%), and speech-related disabilities (8.7%).[39]

Data indicates that disability rates are a clear function of age[40]. As the population ages, this correlation between age and disability means that by the year 2010 there will be a significant increase in the number of working age Canadians with some form of disability[41]. As well, there will be an increase in the number of retired individuals who experience some sort of disability[42].

The projected increase in the numbers of persons who will have some form of disability reinforces the importance of policy work with respect to this ground. Moreover, these figures have critical implications for specific work being

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[36] In 1993, 42% of female paid workers were covered by an employer-sponsored pension plan compared to 47% of male workers. Only 21% of women who filed tax returns contributed to an RRSP in 1992, compared with 30% of men, and women contributed on average $2,444 as opposed to $3,399 for men; "Canada's Retirement Income System: Myths and Realities" *Expression: Newsletter of the National Advisory Council on Aging*, vol. 10 no. 3, *supra* note 25.

[37] Statistics Canada, *Health and Activity Limitation Survey 1991: Back up tables*, Provinces and Territories, Table 4 (Ottawa: 1992), online: Statistics Canada <http://www.statcan.ca>.

[38] "Seniors and Disabilities" *Expression: Newsletter of the National Advisory Council on Aging* (2000) vol. 11 no. 1 at 3, *supra* note 25.

[39] Statistics Canada. *1991 Health and Activity Limitation Survey: Highlights*, 12 Ottawa (1994), online: Statistics Canada <http://www.statcan.ca>.

[40] J. McCallum & D. Holt, "Outlook for people with disabilities...Cautious optimism on a mounting 21st century social challenge", *Current Analysis*, Royal Bank of Canada (April 2000) at 3. This statement is based on analysis of US data, however, the authors conclude that the demographics between Canada and the US are virtually identical allowing nearly identical inferences to be drawn for both societies. Data from Statistics Canada confirms that the proportion of seniors with a long-term disability rises sharply with age; *Statistical Snapshot No. 43: Seniors with Disabilities, supra* note 12.

[41] McCallum & Hold, *ibid.* The paper estimates this figure at 1.4 million.

[42] *Ibid* at 4.

conducted at this time by the Commission in the area of disability.

First, transportation has been characterized as the "passport to independent living" for many older persons. This is especially true for those with disabilities. The review of mass transit accessibility that was recently conducted by the Commission is therefore especially relevant to older persons who require barrier free design to get to public transit, to stand on public vehicles when moving and to get on and off.

In addition, some older persons may have disabilities that arise from respiratory problems and related stamina insufficiencies, but may not qualify for para-transit services because those services may not recognize these types of non-visible disabilities.[43]

Second, planned revisions to the *Guidelines on Assessing Accommodation Requirements for Persons with Disabilities* and other policy work in the area of disability will have significant implications for older persons. For these reasons, the importance of maintaining a high standard of undue hardship that is supported by the legislation should be restated in any policy statement on age.

Third, the Commission should encourage the government to continue to support community-based care, while recognizing that the growing need for institutional care will become pressing in the future, and this in turn will require greater attention to be given to rehabilitation, chronic care and complex continuing care.

## Specific Issues Facing Older Persons

### *Employment*

There are several fallacies about age that are unique to the employment context. There is a widespread view, which has been described as a 'lump-of-labour fallacy', that assumes that every job held by an older worker is one less job available for a younger worker[44]. There is, therefore, a perception that older persons are depriving younger ones of opportunities and that some types of age discrimination are necessary to facilitate job and promotion opportunities for younger workers. Some argue that this approach fails to consider the value of older workers who have experience as well as organizational-specific knowledge and networks[45]. This type of rationale for discrimination against older workers is not unlike the old claim that any job occupied by a woman is one less job for a

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[43] Transportation Development Centre (Transport Canada), *Making Transportation Accessible, A Canadian Planning Guide*, cited in *Expression: Newsletter of the National Advisory Council on Aging*, vol. 13 (1999), *supra* note 25.

[44] *Flexible Retirement*, *supra*, note 11 at 3.

[45] *Ibid.* at 5.

man[46]. This latter example is clearly offensive to notions of equality and yet where similar reasoning is used to justify discrimination on the basis of age it does not attract the same level of scrutiny or concern.

Other stereotypes about older workers include assumptions that they are less ambitious, hardworking and dynamic and that they are more resistant to, or are unable to cope with, technological change[47]. These attitudes and assumptions place older workers at an increased risk for discriminatory treatment when employers undergo reorganization and introduce new technology or methodology[48].

Downsizing, a significant workplace trend in recent years, has been associated with early retirement as an adjustment mechanism[49]. In other words, employers often seek to achieve downsizing objectives by encouraging older workers to leave their jobs through financial incentives, such as early pension benefits and "golden handshakes". However, many other older workers are being pushed out of the labour force by layoffs and unemployment[50]. Despite the fact that generous early retirement packages can be beneficial to older workers, the use of older workers to achieve downsizing objectives is still a phenomenon that needs to be scrutinized. It should be noted that downsizing, while not inherently discriminatory, may encompass questionable practices.

Firstly, there is a concern about whether an offer of early retirement in the face of downsizing represents a truly voluntary option or whether there may be a coercive element to it. Faced with the possibility of losing their job altogether, many workers may feel compelled to accept retirement. As well, the fact that older workers are sometimes approached in a manner that may be seen as imposing a subtle pressure to leave the company through early retirement may lead to a feeling that older workers are being targeted. If they refuse retirement,

[46] *Ibid.* at 13.

[47] For example, one author has criticized the use of seniority in part on the basis that it results in a workforce which is "older, less dynamic and more resistant to technological change"; L. Dulude, *Seniority Systems and Employment Equity for Women* (Kingston: Industrial Relations Centre Press, 1995) at 22 as cited in M.K. Joachim, "Seniority Rights and the Duty to Accommodate" (1998) 24 Queen's L.J. 131 at footnote 23, online: QL (JOUR).

[48] In a recent case that came before the Commission, an employer alleged that after restructuring its operation, it required employees to be more "generalist" rather than "specialist". The complainant was an older worker and was seen as a "specialist" and implicitly unable to adapt.

[49] *Flexible Retirement*, *supra*, note 11 at 5. Many unionized environments protect employees with seniority from the effects of downsizing. However, as one author notes: "The correlation between seniority and age is so inexact that seniority is an ineffective means of protecting older workers." (M.K. Joachim, *supra*, note 47 at para. 32).

[50] G. Schellenberg, "The Road to Retirement: Demographic and Economic Changes in the 1990's" (The Canadian Council on Social Development, 1994) From the Selected Highlights, online: The Canadian Council on Social Development <http://www.ccsd.ca/factret.html>.

their job will be selected for downsizing. Combined with the fact that some older workers may be faced with the negative attitudes already discussed may mean that, for some, accepting early retirement is not a truly voluntary option.

Secondly, as the statistics on seniors' incomes show, there is a potential for income inequality among tomorrow's seniors. Involuntary retirees are twice as likely as voluntary retirees to indicate that their household income is less than adequate to satisfy their needs[51]. Those who accept early retirement in the hopes they will be able to supplement their income with a new job may find it very difficult to find a new job because of their age[52].

It is important to be able to distinguish between offers of early retirement that are truly voluntary and without penalty if not accepted, versus those that are coercive in nature. The former are advantageous to older workers and should not be discouraged while the latter may give rise to human rights concerns. Policy work in relation to age may be able to identify some analytical tools to distinguish between the two.

***Housing***[53]

Housing is a critical issue related to quality of life for seniors. In order to maintain their independence and well-being, seniors need housing that is safe, affordable, accessible and adaptable, allowing maximum freedom and continuation of a person's lifestyle. The normal physical changes that occur as people age and the diseases or disabilities that affect some seniors have implications for housing. In designing and building housing for seniors, the aim should be a barrier-free environment, with recognition that barriers are both physical and psychological. This would enable those who may suffer from some degree of impairment to continue to perform the activities of life.

The National Advisory Council on Aging and other organizations have developed concrete recommendations for barrier-free design.

***Health Care***

Health care is an important issue for everyone in society and particularly for seniors. There are two aspects of this issue that affects seniors. Firstly, the perception that older persons are frail and dependent leads to assumptions that seniors are a strain on the health care system. One author has even suggested

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51 *Ibid.*

52 Among workers over age 55, those who are laid off are twice as likely as younger workers to still be looking for work a year later. Unemployed older workers typically collect employment insurance for 33 weeks, twice as long as younger workers; from "Give older workers a break, employers urged" *The Toronto Star* (17 July 1999) citing Statistics Canada.

53 This discussion with respect to housing is from "A Choice of Housing Lifestyle" *Expression: Newsletter of the National Advisory Council on Aging*, vol. 10 no. 4, *supra* note 25.

that the elderly be required to pay user fees for health care and has concluded that because of the cost of free medical care for the aged,

> *it is clear that it would not be impossible for a government to adduce the evidence required to uphold a discriminatory user fee law under section 1 of the Charter. As McKinney demonstrates, legislation which has been shown to discriminate on the basis of age has been upheld by the Supreme Court in the past. This result suggests that discriminatory user fee legislation could be similarly upheld in the future.* [54]

The author goes on to suggest that the overburdened base of taxpayers will have to look to those using the system disproportionately, *i.e.* the elderly, for some help in funding this use.

These types of negative attitudes in the health care context are more than academic. They result in barriers for elderly persons trying to access the health care system. A survey of 115 Ontario physicians found a failure by many family doctors to treat elderly patients for depression, anxiety disorders and dementia[55]. The survey revealed that younger patients are much more likely to be treated or referred to a psychiatrist or psychologist than older patients. This can be explained, in part, by negative attitudes:

> *The lack of treatment for the elderly for depression, anxiety disorders and dementia has a lot to do with doctors' negative attitudes toward older patients, said Dr. Nathan Herrmann, a geriatric psychiatrist at Sunnybrook and Women's College Health Sciences Centre.*
>
> *Many physicians don't like having older patients in their practice because they take longer to assess and they have more complaints, Herrmann said. As a result, doctors tend to normalize mental disorders for those late in life, expecting them to be depressed as a result of pain and suffering from other ailments*[56].

A province-wide analysis of OHIP billings confirms that despite an increase in spending on mental health care, seniors continue to be underserved, only receiving 15% of the province's mental health care, compared to more than 80% for people between the ages of 20 and 64[57]. A tendency to treat mental illness in older persons as less worthy of intervention is simply a direct form of systemic discrimination.

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54 B. Curtis, "User Fees for the Elderly: Medicare Solution or Dissolution?" (1996) 2 Appeal: Review of Current Law and Law Reform 18 at para. 14, online: QL (JOUR).

55 "Mentally ill seniors not treated: Survey" *The Toronto Star* (10 May 1999).

56 *Ibid.*

57 As reported in "Teens, elderly lag behind in mental health services" *The Toronto Star* (26 April 2000).

The reluctance of doctors to include seniors in their practice is reported in the media as well.[58]

At the same time as being faced with negative attitudes that may result in difficulty accessing the medical services they need, many seniors do have significant needs with respect to health care. The elderly are more prone to suffer health problems and disabilities than persons in younger age groups[59] and the health problems suffered by older persons also tend to be more chronic than those of younger people and to increase in severity[60]. As noted earlier, seniors are hospitalized more often and tend to stay in hospital longer than others. For all of these reasons, there is a need for medical services and facilities that, rather than being more difficult to access, are designed to meet the needs of older persons.

Areas in which seniors' health needs may be inadequately addressed include:

- Limited benefits coverage of health care system: Medicare does not cover all medically-related and dental services which must be paid by individuals or from private insurance plans (which may also have restrictions on coverage). This may be especially acute for older women.
- Inadequate facilities for chronic care: acute care facilities tend to be the focus of the system. Funding for long-term care, complex continuing care and for rehabilitation is less pronounced and less developed.
- Inadequate attention to mental health and social well-being, as distinct from physical health.
- Inadequate community-based health care – the focus is on in-hospital or hospital outpatient services and on services provided by medical practitioners in the community. Many elderly people want to stay in their own homes but the appropriate community-based care and support is not available. While there is a trend towards more of a community-based system, some have noted that this is happening without adequate resources being devoted to homecare.[61]

To the extent that some of these issues relate to government policy choices, they

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[58] See for example, letter to editor "Seniors Turned Away: Doctor won't accept new patients over 65" *Hamilton Spectator* (29 November 1999).

[59] From M. A. Shone, "Health, Poverty and the Elderly: Can the Courts Make a Difference?" (1991) 29 Alta. L. Rev. (No. 4) 839, online: QL (JOUR). The article cites a statistic that about 80% of those over age 65 report at least one health problem, compared to 54% of the Canadian population as a whole; from Health and Welfare Canada, *The Active Health Report on Seniors – What We Think, What We Know, What We Do* (Ottawa: Minister of National Health and Welfare, 1989) at 5 [hereinafter "Active Health Report"].

[60] Active Health Report, *ibid.* at 3.

[61] From Shone article, *supra* note 59.

are not matters for human rights commissions. However, if the needs of growing numbers of elderly persons are being chronically underestimated or simply not addressed, there is a genuine concern that the quality of life for this group of citizens will deteriorate sharply as the baby boomer generation starts to enter this age group.

***Nursing Homes and other Institutions***

The development of an adequate system of publicly insured, community-centred nursing home care is also vital. Despite an increase in the use of community-based health care, the need for nursing homes is predicted to increase as the proportion of older persons in the population increases and, particularly, as the proportion of the very oldest persons rises[62]. Improving the system of residential institutions would especially benefit elderly women, as they are far more likely to live in institutions than their male counterparts[63].

Another important issue is the need for facilities that address the needs of particular seniors. Gay and lesbian seniors have trouble finding safe and comfortable institutions where they do not fear being isolated and excluded unless they hide their sexual orientation[64]. Certain religious and cultural communities find that there are no facilities to address the religious, cultural or linguistic needs of their seniors[65].

**Elder Abuse and Neglect**

In March 2000, the Quebec Human Rights Commission held public hearings into mistreatment of the aged in privately-run residences and public long-term hospitals. The province's nurses have reported that old people in nursing homes are frequently tied to their beds, intimidated, threatened, physically and sexually abused and ignored.[66]

Elder abuse and the problem of unregulated nursing homes are also issues in Ontario. An Elder Abuse Round Table has been formed to devise a comprehensive provincial plan to combat elder abuse. It met for the first time in December 1999. The Round Table includes 20 influential seniors and opinion leaders representing many sectors where elder abuse can occur. The group will advise government on a multifaceted strategy which will focus on training professionals and front-line workers, increasing public awareness and improving co-ordination of services within the community.

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62 *Ibid.*

63 *Ibid.* See also demographics in section on *Seniors and Institutions*.

64 "Gay, lesbian seniors face discrimination" *Peterborough Examiner* (4 April 2000).

65 "South Asian community wrestles with aging issue" *The Toronto Star* (29 April 2000).

66 "Seniors routinely neglected, abused: Nurses – Quebec hospitals and homes must change, commission hears" *The Toronto Star* (9 March 2000).

Not surprisingly, as with other social problems facing the elderly, societal attitudes have been blamed for elder abuse. One expert has eloquently described the situation and the steps that are needed to address it:

> *Elder abuse occurs across Ontario, in large part, because ageism exists: the entrenched perception that all those over 65 are frail, dependent and non-contributing...*
>
> *A comprehensive public education program needs to be undertaken by government to deal with the root causes of elder abuse in its various forms and address the negative stereotypes that legitimize elder abuse.*
>
> *Until the elderly are fully recognized as individuals with the same human needs and rights as other citizens, abuse of the elderly will prevail – whether it takes place in the home, the community, or institutions.*[67]

**Elder Care**

Increasing numbers of Canadians are caring for aging or ailing family members. One in five adult women in Canada looks after a person in the home who is chronically ill or disabled, spending on average 28 hours a week. Currently, 12% of working Canadians are full-time caregivers for loved ones. This is in part due to an increased emphasis by governments on home care, as opposed to hospital care, in some cases without adequate community services in place.[68] The provision of elder care is placing increasing pressure on people to meet the competing demands of work and family responsibilities.

As a result, there has been a call for steps to address the situation of those who care for family members through measures such as 'eternity leave' which would involve time off to care for family members near the end of their life. The Canadian Association for Retired Persons, Canada's largest seniors group, is calling for a 'bill of rights' that would give compensation to those who quit their jobs to care for family members, tax breaks, training programs and national standards for hours and working conditions[69].

The Commission's publication *Human Rights at Work* recognizes the issues raised by elder care[70] and notes that the *Code* ground of "family status" may cover elder care given to a parent. *Human Rights at Work* recognizes that

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67 Letter to the Editor, "Prejudice allows abuse to flourish" from B. Burns, Chair, Aging Issues Committee, Ontario Association of Social Workers.

68 "Seniors want bill of rights" Newspaper article (6 August 1999).

69 *Ibid.*

70 Ontario Human Rights Commission, *Human Rights at Work* (Toronto: 1999). The discussion of elder care appears at pages 71-72.

employers have a positive and supportive role to play in helping employees balance competing demands and states that "the employer's duty to accommodate extends to employees who have work-related absences due to family related responsibilities" (child-care or parent-care responsibilities). The publication suggests more flexibility in the workplace and alternative work arrangements as a means to permit employees to balance work and personal demands and contribute to the effective use of a skilled labour force.

**Protection of 'Age' In Human Rights Legislation**

The Ontario *Code* prohibits discrimination and harassment on the basis of age in all social areas covered by the *Code*[71]. All other Canadian jurisdictions provide protection for discrimination on the basis of age in employment[72]. With the exception of Alberta, British Columbia and Newfoundland, all Canadian jurisdictions also provide the protection in relation to accommodation, facilities and services generally available to the public. Furthermore, most jurisdictions accord protection from discrimination on the basis of age with respect to residential and commercial tenancies and in relation to the purchase and sale of property (in particular: British Columbia, Manitoba, New Brunswick, Northwest Territories, Nova Scotia, Prince Edward Island, Quebec and Saskatchewan).

In Ontario, there is no upper limit on age in the areas of housing, goods, services and facilities, contracts and vocational associations. However, in employment there is a maximum age for discrimination, namely 65[73]. In other words, in employment only, the *Code* does not protect against discrimination **on the basis of age** where the individual is 65 years of age or more. That is not to say that persons 65 or over do not receive the protection of s. 5(1) of the *Code*, they can still complain about discrimination in employment on the basis of any ground other than age.

A few other Canadian jurisdictions define age by setting a maximum age[74]. In British Columbia, Newfoundland and Saskatchewan, as in Ontario, the maximum age limit for a claim in employment on the basis of age is 65. In Saskatchewan only the maximum limit also applies to other areas of discrimination (e.g. services). In all cases, the maximum is set at 65 years of age which, following a long history, has became a standard retirement age in several jurisdictions and is also the age when various pension benefits commence.

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71 In sections 1, 2, 3, 5 and 6.

72 The discussion of the age discrimination provisions in Canadian jurisdictions is from R.W. Zinn & P.P. Brethour, *The Law of Human Rights in Canada: Practice and Procedure* (Aurora: Canada Law Book, 1999).

73 Definition of "age" in s. 10(1) of the *Code*.

74 As this paper only considers human rights issues facing older persons, a discussion of minimum age requirements in many *Codes*, including the Ontario *Code*, has been omitted.

**Mandatory Retirement at Age 65**

Maximum age limits are used by employers to institute mandatory retirement policies at age 65 and these limits have been challenged under the *Charter.* There are many cases considering the issue, including several decisions of the Supreme Court of Canada. Although the cases differ in some respects (for example, some involve *Charter* challenges to legislation while others involve the application of mandatory retirement defences in human rights codes), mandatory retirement at age 65 has always been found justifiable by the Supreme Court[75].

In *McKinney v. University of Guelph,*[76] the Supreme Court of Canada considered the constitutionality of s. 10(1) of the Ontario *Code*, which limits protection from age discrimination in employment to persons between 18 and 65 and which therefore permits mandatory retirement policies for those aged 65 or over. The Supreme Court found that the maximum age limit of 65 was *prima facie* discrimination on the basis of age contrary to s. 15(1) of the *Charter.* However, it was found to be a reasonable limit on the right and hence saved by s. 1 of the *Charter*[77].

In the s. 1 analysis, the court traced the background of mandatory retirement policies and their impact on the workplace. Mandatory retirement was developed with the introduction of private and public pension plans and had a profound impact on the organization of the workplace and the structure of pension plans, on fairness and security of tenure in the workplace and on opportunities for others. The Supreme Court found that one of the objectives of the impugned section of the *Code* was to arrive at a legislative compromise between protecting individuals from discrimination and giving employers and employees the freedom to agree on a date of termination considered beneficial to both. The objectives of the section, namely to preserve the integrity of pension plans and to foster the prospects of younger workers by establishing an age maximum, were found to be pressing and substantial, to be rationally connected to the restriction on the right and to minimally impair the equality rights of older persons.

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75 The Nova Scotia Court of Appeal has ruled that provisions of the Nova Scotia *Human Rights Act*, which protects only those between the ages of 40 and 64 from discrimination on the basis of age, violate s. 15 of the *Charter* and that the violation cannot be justified under s. 1; *Sniders v. Nova Scotia (Attorney General)* (1988), 55 D.L.R. (4th) 408. However, given that the Supreme Court's decision in *McKinney, infra,* note 76 dealt with the constitutionality of Ontario *Code*, the Nova Scotia decision would appear not to have any effect in Ontario.

76 [1990] 3 S.C.R. 229 [hereinafter *McKinney*].

77 In *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451, the Supreme Court reached the same result with respect to the restrictive definition of age (between 45 and 65) in s. 1 of the British Columbia *Human Rights Code.*

The issue of mandatory retirement at age 65 was considered by the Supreme Court on several subsequent occasions. In *Stoffman v. Vancouver General Hospital*[78], the Court applied *McKinney* and found that a regulation which took away doctors' hospital privileges at age 65, in effect forcing them to retire, was justifiable under s. 1 of the *Charter*[79]. Of interest in this case was the Court's implicit acceptance of the notion that older persons are not "on the cutting edge of new discoveries and ideas" and that at age 65, doctors are "less able to contribute to the hospital's sophisticated practice". Despite recognizing that there will be considerable variety between individuals as to the rate at which the skills and aptitudes essential to the practice of medicine deteriorate, the Court rejected skills testing or performance evaluations as an option.

This should be contrasted with the two dissenting opinions in *Stoffman*. Madame Justices Wilson and L'Heureux-Dubé both rejected the stereotype, which forms the unarticulated premise of mandatory retirement, that with age comes increasing incompetence and decreasing ability. L'Heureux-Dubé J.'s dissent rejects the notion that a person somehow becomes less fit the day after her 65th birthday:

> *In McKinney, I expressed the view that forcing the end of a career based on age alone does not pass muster under the Charter, as age is surely not determinative of capacity or competence. One is no less competent the day after one's 65th birthday, than the day before. Fundamentally it is a question of personal dignity and fairness....The same concerns can be raised in this case. Medical practitioners do not become incompetent at a given age. One falls below acceptable levels of proficiency through inattention to medical advances and, inter alia, inadequate physical stamina and health. But a forced retirement policy is arbitrary and simply sets a date for all this to occur. It confounds logic to suggest that these concerns simply occur on the passing of a given day in all cases.*[80]

The issue of mandatory retirement at age 65 for university professors was once again raised in *Dickason v. University of Alberta*[81]. Unlike the situation in *McKinney*, the Alberta *Individual Rights Protection Act* did not have a maximum age. Therefore, the issue was whether the defence within the Act, which permitted employers to discriminate where it was "reasonable and justifiable in the circumstances", applied to the scheme. Despite a holding that the university was not to be accorded deference, and although a legislative defence to discrimination should be construed narrowly, the court nevertheless found the

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78 [1990] 3 S.C.R. 483 [hereinafter *Stoffman*].

79 Before undertaking this analysis, the Court ruled that the *Charter* did not apply to the hospital regulation. This ruling was sufficient to dispose of the case in favour of the hospital, but nevertheless the Court went on to consider whether there was a violation of s. 15 of the *Charter*.

80 *Stoffman, supra* note 78 at 560-1.

81 [1992] 2 S.C.R. 1103.

scheme reasonable and justifiable in the circumstances.

In *Cooper v. Canada (Human Rights Commission)*[82], an express mandatory retirement defence contained in the *Canadian Human Rights Act* was unsuccessfully challenged. While that Act did not limit its application to a maximum age, it contained a provision (s. 15(c)) which stated that it is not discriminatory to retire a person at the normal retirement age for their occupation. Mr. Cooper, an airline pilot, was forced to retire at age 60, the normal age of retirement for airline pilots. The Federal Court Trial Division, upheld by the Federal Court of Appeal, found that because of the *McKinney* decision, the Supreme Court had effectively endorsed the legality of s. 15(c) of the *Canadian Human Rights Act.*

Despite the decision in *McKinney* and the restricted definition of 'age' in the Ontario *Code*, it appears that in the labour relations context it may be possible to have an age-based mandatory retirement policy at age 65 ruled invalid. This was the result in *Ottawa Hunt and Golf Club v. Hospitality and Service Trades Union, Local 261*[83]. In that case, the collective agreement had a provision prohibiting discrimination because of age with no qualification, i.e. for mandatory retirement. What is interes ting about the decision is the fact that the arbitrator noted that the Ontario *Code* can be used to interpret a collective agreement provision where conflict with the legislation would otherwise render the provision invalid (e.g. if the agreement attempted to contract out of the *Code*). However, where, as in this case, the union's interpretation would not result in any illegality, there was no reason to import the *Code*'s restrictions on the term 'age'.

**Mandatory Retirement as a Bona Fide Occupational Requirement**

The Ontario *Code* and other human rights legislation permit discrimination on the basis of age where it is a reasonable and *bona fide* qualification because of the nature of the employment, the so-called *bona fide* occupational requirement or BFOR defence[84]. Accordingly, where employers impose mandatory retirement at an age less than 65[85], a complaint can be brought under the *Code* and the issue then is whether the employer can establish that age is a BFOR.

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82 (1992), 22 C.H.R.R. D/87, affd 22 C.H.R.R. D/90, affd [1996] 3 S.C.R. 854.

83 *Ottawa Hunt and Golf Club v. Hospitality and Service Trades Union, Local 26* (12 October 1996) (unreported LAC decision).

84 Section 24(1)(b) and 24(2).

85 As noted earlier, if the age for mandatory retirement is 65 or older, no challenge is possible in Ontario as the Ontario *Code* only protects those under the age of 65 from discrimination on the basis of age. In jurisdictions where human rights legislation does not contain a maximum age limit or other defence to mandatory retirement at age 65, the employer will have to show that the mandatory retirement scheme is a BFOR.

The test for a BFOR in the context of age discrimination was established by the Supreme Court in an Ontario case, *Ontario Human Rights Commission v. Etobicoke*[86]. In that case, the complainant was a firefighter who was forced to retire at age 60. McIntyre J. set out the following test to determine whether a mandatory retirement scheme is justifiable:

(1) Subjective component: the employer must establish that mandatory retirement was imposed honestly, in good faith, and in the belief that the limitation is in the interests of the adequate performance of the work, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the *Code*.

(2) Objective component: the employer must establish that the retirement plan is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

With respect to the second element, a scheme based on economics, i.e. related to productivity, will be much harder to justify than one based on public safety:

> *In cases where concern for the employee's capacity is largely economic...it may be difficult, if not impossible, to demonstrate that mandatory retirement at a fixed age, without regard to individual capacity, may be validly imposed under the Code.*[87]

To establish the scheme on the basis of public safety, the Court must consider whether the evidence justifies the conclusion that there is sufficient risk of employee failure in those over the mandatory retirement age (in this case, 60) to warrant setting retirement at that age in the interests of safety.[88]

In a similar case, *Large v. Stratford (City)*[89], the Supreme Court considered a mandatory retirement policy that required police officers to retire at age 60. The policy had been adopted and included in the collective agreement in response to the demands of the police union. The Supreme Court found the policy discriminatory but justifiable on the basis of the BFOR defence. The Court noted that the purpose of the subjective component of the defence is to ensure that employers adopt the rule for a valid reason. Courts should not apply it in too rigid a fashion, for example by insisting on evidence as to the employer's state of mind. In this case, the policy was as a result of a negotiated term of a collective agreement and if the employer acted honestly and without any ulterior motive in

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86 (1982), 132 D.L.R. (3d) 14 (S.C.C.) [hereinafter *Etobicoke*].
87 *Ibid.* at 20.
88 *Ibid.* at 21.
89 [1995] 3 S.C.R. 733.

entering into the collective agreement, as in this case, the subjective element is satisfied. With respect to the objective component, the Court stated that justification of a general rule that treats all employees as having the same characteristics is dependant on proof by the employer that it is not practical to identify and exempt from the general rule those who lack the requisite characteristics. An employer can discharge its obligation by showing that individual testing is impractical. In this case, the employer adduced evidence of the combination of cardiovascular disease and decline of aerobic capacity sufficient to satisfy the objective branch of the test.

In *MacDonald v. Regional Administrative School Unit No. 1*[90], a Board of Inquiry upheld mandatory retirement of school bus drivers at age 65. Expert medical evidence indicated that, as a group, those over 65 are more likely to have accidents, and that it is impossible to test individually to determine who is likely to have health problems or create risks for others.

In several other cases, mandatory retirement has been found to be a BFOR[91]. In others, the employer has not met the onus of satisfying both parts of the *Etobicoke* test. In *Gerlach v. Canada Trust Co.*[92], the mandatory retirement of a switchboard receptionist was found to violate the British Columbia *Human Rights Code* as no evidence was presented to substantiate a *bona fide* occupational requirement.

**Other Age Cases in the Employment Context**

***Recruitment***

Age is a barrier for individuals when trying to get a job. This problem is so prevalent that the Supreme Court of Canada has taken judicial notice of it:

> *It seems to me that the increasing difficulty with which one can find and maintain employment as one grows older is a matter of which a court may appropriately take judicial notice. Indeed, this Court has often recognized age as a factor in the context of labour force attachment and detachment.*[93]

In Ontario, and the other Canadian jurisdictions, legislation prohibits discrimination based on age in advertising job vacancies and recruiting new employees. Moreover, every jurisdiction protects candidates for employment

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90 (1992), 16 C.H.R.R. D/409 (P.E.I. Bd. Inq.).

91 For example, *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, [1989] 2 S.C.R. 1297 (Chief Fire Prevention Officer), *Hope v. St. Catherines (City)* (1998), 9 C.H.R.R. D/4635 (Ont. Bd. Inq.) (Firefighters).

92 (1990), 14 C.H.R.R. D/211 (B.C.C.H.R.).

93 *Law v. Canada (Minister of Employment and Immigration), infra* note 115 at para. 101.

from having to disclose their age on any application form or during an interview.[94] Where such questions are relevant to company pension or benefit plans, the employer can only ask for the information after making an offer of employment.

In Saskatchewan, the police force sought an exemption from this rule so it could ask for the date of birth of applicants for the purposes of a criminal record check. The Saskatchewan Human Rights Commission[95] refused the exemption stating that applicants could be asked questions with respect to criminal records and offers of employment could be conditional upon satisfactory confirmation that the applicant has no record. Thus, asking for age on the application form was not necessary.

It is also not permissible to ask the applicant's age during an interview unless age is a reasonable and *bona fide* occupational requirement.

There are several cases which have considered whether age was a factor in the decision not to hire a complainant. The decision in *Bradley v. Canada (AG)*[96] demonstrates that it is very difficult to prove age discrimination in hiring cases (employers rarely say that age is the reason for not giving the applicant the job). In *Bradley*, the Canadian Armed Forces had hired a younger officer for the position and someone had noted the complainant's age of 43 years in the margin of notes used for assessment. The complaint was dismissed on the basis that there was insufficient evidence of discrimination. Had the complaint been that of a racial minority, whose race had been noted in the margin of interview notes, one wonders if the result would have been the same.

In *Winsor v. Provincial Demolition and Salvage Ltd.*[97], the 55 year old complainant applied for a construction job and was told that his age was a factor in not being hired. The Board of Inquiry found discrimination and as the respondents were not present, a BFOR defence was inapplicable.

In *O'Brien v. Ontario Hydro*[98], a 40 year old man was refused an apprenticeship. The employer did hire a number of persons in the 40 to 65 age range but not in the apprenticeship program. The employer considered that age had relevancy when determining whether a person might adapt to certain job conditions, for example, menial tasks, minimal responsibility, low pay and shift work. The Board concluded that age stereotyping was the proximate cause for the refusal and

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94 Section 23 of the *Code* deals with discriminatory employment ads, applications for employment and questions at interviews. See also the Commission's publication *Hiring? A Human Rights Guide* for further discussion of human rights issues in recruitment.

95 In *Saskatchewan (Police Commission) (Re)* (1984), 5 C.H.R.R. D/2317 (Sask.H.R.Comm.).

96 [1999] FCJ No. 370 (F.C.A.), online: QL (CJ).

97 [2000] NHRBID No. 1 (Nfld. Bd. Inq.), online: QL (HRBD).

98 (1981), 2 C.H.R.R. D/504 (Ont. Bd. Inq.).

found for the complainant.

***Age as a BFOR***

There are a few decisions dealing with age as a BFOR outside the context of mandatory retirement. The cases appear to indicate that, outside the context of mandatory retirement, establishing that age is a BFOR is very difficult. In *Canada (Human Rights Commission) v. Greyhound Lines of Canada Ltd.*,[99] the employer was unable to establish that its policy of refusing to hire new bus drivers over the age of 34 was a BFOR. The evidence of a relationship between age and an inability to cope with stress was rejected. Similarly, Air Canada was unable to justify its requirement that all pilot applicants over the age of 27 have greater qualifications than younger applicants[100]. Air Canada sought to justify its policy on the basis of public safety and economic factors.

In *Cranston v. Canada*[101], the issue was whether a group of pilots and flight attendants had been discriminated against when they were not transferred from the Department of Transportation to the Department of National Defence (when the service they had provided was transferred). Initially, the Tribunal had concluded that the fact that the group had an average age of 51 did not contribute to the decision. However, on judicial review the Federal Court Trial Division (upheld by the Federal Court of Appeal) agreed that while the age of the complainants was not the proximate cause of the decision to transfer, the evidence did suggest that age was a factor in the implementation of the decision. The matter was remitted back and the new Tribunal[102] found that the complainants had been victims of direct and indirect discrimination. The new Tribunal held that the age of the complainants was a factor considered by the Department of National Defence in determining how to integrate the civilian flight service into the military one. The Department had not demonstrated that age was a *bona fide* occupational requirement as the objective element of the *Etobicoke* test had not been established.

***Workplace Benefits***

A sick leave plan which denied benefits to those over the age of 55 was found to be discriminatory in *Heidt v. Saskatoon (City)*[103]. The Saskatchewan *Human Rights Code* contained a provision that the prohibition on discrimination in employment because of age does not prevent the operation of any term of a *bona fide* group or employee insurance plan. The Court of Appeal held that for

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99 (1984), 6 C.H.R.R. D/2512 (Can. Trib.), affd 7 C.H.R.R. D/3250 (Can. Rev. Trib.), affd 8 C.H.R.R. D/4184 (F.C.A.).

100 *Air Canada v. Carson* (1985), 6 C.H.R.R. D/2848 (Fed. C.A.).

101 (1993), 22 C.H.R.R. D/22 (Can. Trib.), revd 22 C.H.R.R. D/40 (T.D.), affd 29 C.H.R.R. D/83 (C.A.).

102 (1997), 30 C.H.R.R. D/456 (Can. Trib.).

103 (1988), 9 C.H.R.R. D/5380 (Sask. Bd. Inq.), affd 10 C.H.R.R. D/5808 (Sask. Q.B.), revd 12 C.H.R.R. D/387 (C.A.), leave to appeal refused 74 D.L.R. (4th) viii (S.C.C.).

the defence to succeed, the plan must meet the objective test of a *bona fide* requirement, as set out in *Etobicoke*, and that no evidence was led to establish that the discrimination was reasonably necessary to allow the respondents to put into place a viable and cost-effective sick plan. This case represents a good example of intersectionality between disability and age.

In a case where persons who accepted early retirement (at age 50 instead of 60) got reduced pension benefits, age discrimination was not established[104]. The Alberta Human Rights Commission accepted the evidence of the Superintendent of Pensions that the actuarial present value of reduced pensions under the employer's plan was at least equal to the present value of the deferred pensions at age 60.

In *Gell v. Canadian Pacific Ltd.*[105], the Federal Court of Appeal affirmed a decision that an amendment to a pension plan permitting some members to buy back pension benefits was not a violation of the *Canadian Human Rights Act*. The complainants argued discrimination on the basis of age because, until 1980, there was a rule that an employee could not join the pension plan if s/he joined the company after age 40. The court found that the age restriction was legal at the time it was imposed and that the buy-back option discriminated not on the basis of age but on the basis of when one became a member of the plan.

Section 22 of the Ontario *Code* provides that automobile, life, accident, sickness or disability insurance, group insurance or life annuity policies that are outside of the employment context may make distinctions based on age, sex, marital and family status, or handicap, but these distinctions must be made on reasonable and *bona fide* grounds.

***Seniority***

It is not permissible to use date of birth to assign seniority when more than one employee is hired on the same day[106].

***Termination of Employment***

A review of Tribunal decisions and a survey of Commission complaints indicates that it is very difficult for an employee to establish a *prima facie* case of age discrimination when terminated from employment. Employers often terminate older employees citing poor performance or after workplace downsizing or reorganization.

In this latter example, many of the negative stereotypes that plague older

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104 *Younger v. Gulf Canada Resources Ltd.* (1988), 10 C.H.R.R. D/6114 (Alta. H.R. Comm.).

105 (1986), 8 C.H.R.R. D/4169 (Can. Trib.), affd 10 C.H.R.R. D/5494 (F.C.A.).

106 *Dalton v. Canadian Human Rights Commission* (1985), 15 D.L.R. (4th) 548 (T.D.), revd in part 25 D.L.R. (4th) 260 (C.A.), leave to appeal refused 67 N.R. 158n (S.C.C.).

persons come into play. For example, an older employee may find her position declared redundant and may not be given another job within the organization because of a perception that her skills are limited to the job she has been doing (often for a long period of time) and that she is unable to adapt to a new position or learn to use new technology. Another example, and one that was seen in a recent Commission case, is the situation where new management comes in and favours a "rejuvenation"[107] of the workforce.

If the complainant is able to establish a *prima facie* case of discrimination, it is very difficult for the employer to establish that the termination is justified on the basis that age is a BFOR (see earlier section on *Age as a BFOR*).

The decisions in *Adams v. Bata Retail*[108] and *Watchman v. Canada Safeway Ltd.*[109] provide two good examples of 'typical' cases in this area. In the first case, the Ontario Board of Inquiry did not find age discrimination but found that the complainant's employment was terminated primarily on the basis of unsatisfactory performance and also because the company was making changes in an effort to overcome financial difficulties. Similarly, in the second case, the complainant's demotion was found to be because of work performance.

The decision in *Kearns v. Dickson Trucking Ltd.*[110] is one example of a case in which age discrimination was successfully made out. However, the evidence in that case was overwhelming and there was no other reasonable explanation for the termination. The complainant, a 69-year-old salesman, was the best in the organization and there were no complaints at any time about his performance. He was terminated on the basis of "a lack of potential in the area serviced by him", however, the first time this issue was ever raised was in the letter of termination. His position was not declared redundant but rather was filled by a younger person. Mr. Kearns was awarded damages for lost wages and for hurt feelings and self-respect.

Of course, employers are not precluded from terminating older employees where there are legitimate performance concerns. However, it should not be the case that age discrimination will only be found where employees who are the best in their organization, or who have an absolutely exemplary work record, are terminated. In other words, there should be some middle ground between these two extremes. The goal of the Commission's policy development on age should be to define this middle ground.

With respect to cases of targeting older employees in an effort to achieve

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107 Webster's Ninth New Collegiate Dictionary defines "rejuvenate" as: to make young or youthful again, to restore to an original or new state.

108 (1989), 10 C.H.R.R. D/5954 (Ont. Bd. Inq.).

109 (1992), 16 C.H.R.R. D/322 (B.C.C.H.R.).

110 (1988), 10 C.H.R.R. D/5700 (Can. Trib.).

downsizing objectives, one case stands as a good example. In *Mckee v. Hayes-Dana Inc.*[111], the Board of Inquiry found age discrimination. The employer underwent a downsizing and a number of staff, including the complainant, were interviewed and informed of the need for staff reduction. Two options were offered: lay-off with full salary and benefits for six months, followed by separation pay or early retirement with adjusted pension so there would be no reduction in pension benefits. The complainant accepted the latter option. When determining who among the staff to reduce, the vice-president prepared a note stating that the company "hoped to keep people with career potential". In the past, lay-offs had been conducted on the basis of seniority.

On this evidence, the Board concluded that age was part of the reason for the selection of the complainant. The note indicated the company intended to keep people who were not on the verge of retirement and had many years of service left: "The phrase may be a euphemism; its meaning concerns age". Age was found to be a motivating factor for the termination and a *prima facie* case was established. What is also interesting about this case is the fact that the complainant was offered a generous early retirement package did not detract from the finding of discrimination or the awarding of damages. In other words, an early retirement option that is not voluntary, no matter how generous, does not defeat a case of age discrimination.

**Non-employment Cases**

Outside the employment context, there are few cases that deal with discrimination against older persons. In the context of housing, age discrimination cases under human rights legislation tend to deal with issues facing younger people. However, older persons may experience discrimination on the ground of age or on the potentially related grounds of disability and receipt of public assistance (which would include government pensions).

One important decision in the health care context is that of *Ontario (Human Rights Commission) v. Ontario (Ministry of Health)*[112]. The Ontario Ministry of Health Assistive Devices Program provided closed circuit television magnifiers only to persons under 25 years of age. The complainant, a 71 year old man, was refused this visual aid. Although the Board of Inquiry found that the program was a special program protected by s. 14(1) of the *Code*, the majority of the Court of Appeal rejected this finding. The Court noted that in addition to protecting affirmative action programs from challenge, the purpose of s. 14(1) is to promote substantive equality. Special programs are aimed at achieving substantive

111 (1992), 17 C.H.R.R. D/79, supplementary reasons 19 C.H.R.R. D/511 (Ont. Bd. Inq.).

112 (1989), 10 C.H.R.R. D/6353 (Ont. Bd. Inq.), affd 14 C.H.R.R. D/1 (Ont. Div. Ct.), revd 21 C.H.R.R. D/259 (C.A.).

equality by assisting disadvantaged persons to compete equally with those who do not have the disadvantage. Special programs should be designed so that restrictions within the program are rationally connected to the objective of the program. In this case, the connection was not established. The Court found that the program was initiated with age restrictions to have a small pool of clients and to conserve scarce financial resources, not because younger persons with disabilities have a greater need of such aids and less access to them than older persons.

**Permissible Distinctions on the Basis of Age**

In addition to the BFOR defence, discussed above, there are other exceptions in the *Code* which permit distinctions to be made on the basis of age. The provision dealing with pensions and related benefits provides that:

> *25. (2) The right under section 5 to equal treatment with respect to employment without discrimination because of age, sex, marital status or family status is not infringed by an employee superannuation or pension plan or fund or a contract of group insurance between an insurer and an employer that complies with the Employment Standards Act and the regulations thereunder.*

The *Code* expressly provides for the preference of persons over 65 years of age in certain circumstances. Section 15 states:

> *15. A right under Part I to non-discrimination because of age is not infringed where an age of sixty-five years or over is a requirement, qualification or consideration for preferential treatment.*

As well, the provision dealing with special programs in general (s. 14) may allow the implementation of a special program, if all the requirements are met, where the preferential treatment is aimed at older persons who have not reached the age of 65. A Board of Inquiry has considered one such special program aimed at persons under 65 years of age. In *Broadley v. Steel Co. of Canada Inc.*[113], a provision in a collective agreement granting employees with 25 years of service extended vacations beginning at age 61 was challenged on the basis that it discriminated against those under 61 years of age. The respondents argued that the benefit was designed to relieve hardship and therefore qualified as a special program under s. 14 of the *Code*. The Board of Inquiry applied a very broad definition of 'hardship': hardship covers a range of problems stretching from something "more than mere inconvenience" through "adversity, suffering, or

[113] (1991), 15 C.H.R.R. D/408 (Ont. Bd. Inq.).

humiliation" to "extreme privation or difficulty" [114]. The Board went on to find that moving from fulltime work, spanning a lifetime, to the complete absence of work is a major change carrying with it social, psychological and financial implications. Accordingly, the hardship that extended pre-retirement vacation provision was designed to alleviate was the difficulty older workers often experience in the transition from full employment to full retirement. As the provision was designed to relieve hardship, it qualified as a special program.

It is interesting to note that the Board in *Broadley* commented that the vacation scheme did not involve a meticulously designed, elaborate, detailed and carefully monitored special program as envisaged by the Commission's *Guidelines on Special Programs*. Nevertheless, the fact that the provision did not meet all the suggested standards was not fatal to the s. 14 argument. This illustrates that some aspects of the *Guidelines* do not always fit well with special programs designed to alleviate hardship and disadvantage in relation to age. Another example of this is the section of the *Guidelines* that states that the special program should indicate that it is for a specific time and is of a temporary nature. Some special programs in relation to age, for example housing specially designed for and restricted to older persons, cannot reasonably be temporary.

The *Broadley* decision demonstrates a desire on the part of decision-makers to uphold schemes that give benefits to older persons when they are challenged by younger persons who cannot access the benefits. The decision-maker in that case upheld the scheme by finding it to be a special program. However, in light of a recent Supreme Court of Canada decision, there may be another option for finding these types of age distinctions non-discriminatory.

In *Law v. Canada (Minister of Employment and Immigration)*[115] the court considered the constitutionality of age distinctions for determining entitlement to survivor pensions under the *Canada Pension Plan*. The appellant, Nancy Law, was not entitled to a survivor's pension when her spouse died because she was too young (Ms Law was 30 years old and the minimum age for entitlement was 35). The Supreme Court summarized and commented upon the basic principles relating to the purpose of s. 15(1) of the *Charter* and provided a set of guidelines to assist courts when analyzing a discrimination claim.

The approach set out in *Law* requires the same three step analysis first articulated in *Andrews v. Law Society of British Columbia*[116]. However, the *Law* decision elaborates on the application of the three-step analysis and the factors to be taken into account. In analyzing a discrimination claim, the court should

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[114] *Ibid* at 411. Quoting from Professor Backhouse's decision in *Roberts v. Ontario (Ministry of Health)* (1989), 10 C.H.R.R. D/6353 (Ont. Bd. Inq.).

[115] [1999] 1 S.C.R. 497, online: Supreme Court of Canada <http://www.lexum.umontreal.ca/csc-scc/en/index.html>.

[116] [1989] 1 S.C.R. 143.

make the following three broad inquiries:

1) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within society resulting in substantively differential treatment?

2) Is the claimant subject to differential treatment based on one or more enumerated and/or analogous grounds?

3) Does the differential treatment discriminate by imposing a burden upon, or withholding a benefit from, the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.

As the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, an essential component of the discrimination analysis is a determination of whether the law has the effect of demeaning a claimant's dignity. There are several factors that will be important to this determination, for example any pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue.

In Nancy Law's case, the legislation at issue clearly drew a distinction on the basis of personal characteristics and she was subject to differential treatment based on an enumerated ground in s.15(1) of the *Charter*, namely age. Accordingly, the first two elements of discrimination analysis were easily met. However, the central issue was whether the age distinction constituted discrimination under s. 15(1) of the *Charter*. The court observed that, relatively speaking, adults under the age of 45 have not been consistently and routinely subjected to the sorts of discrimination faced by some of Canada's discrete and insular minorities. The purpose of the provisions was to enable older widows and widowers to meet their basic needs during the longer term. Younger persons face fewer impediments to long-term labour force participation. The law did not reflect or promote the notion that younger persons are less capable or less deserving of concern, respect and consideration nor did it perpetuate the view that people under the age of 45 are less capable or less worthy of recognition or value. The legislation did not stereotype, exclude, or devalue adults under age 45. Moreover, the law had a clear ameliorative purpose, i.e. to address the needs of a more disadvantaged group, which accords well with the fundamental purposes of s. 15(1) of the *Charter*. For all of these reasons, the legislation was

found not to demean Ms. Law's human dignity and freedom and was not discriminatory contrary to s. 15(1) of the *Charter*.

The application of this case to age discrimination claims under the *Code* will have to be considered further in the Commission's policy work in relation to age. However, the decision may address various programs[117] that give benefits to individuals under the age of 65 and which might not otherwise qualify as special programs under s. 14 of the *Code*. Provided all the elements of the approach articulated in *Law*are met, these schemes may be permissible and may not discriminate against younger individuals who are not entitled to the benefit.

**International Recognition of Issues Related to Aging**

Unlike the situation with other population groups such as women and children, no comprehensive international convention yet exists in relation to the rights of older persons. However, the UN, including its specialized agencies such as the International Labour Organization (the "ILO"), has turned its attention to issues related to aging. In 1982, the World Assembly on Ageing adopted the *Vienna International Plan of Action on Ageing*[118] (the "*Plan of Action*"). This document, endorsed by the UN General Assembly in Resolution 37/51, contains 62 recommendations aimed at strengthening the capacities of states to deal effectively with aging populations. Nine years later, the UN General Assembly adopted the *United Nations Principles for Older Persons*[119] (the "*Principles for Older Persons*") which contains 18 principles relating to the areas of 'independence', 'participation', 'care', 'self-fulfillment' and 'dignity'. Every four years, the Economic and Social Council, through the Commission for Social Development, reviews the implementation of the *Plan of Action* and reports back to the General Assembly on the progress made within the UN system in achieving the goals and objectives of the plan.[120]

The *Plan of Action* identifies a number of important principles in relation to aging. Many of the principles relate to the issues discussed in this paper, for example, the provision of accessible housing[121], appropriate health care services[122],

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117 Examples include retirement schemes that are based on a combination of age and years of service (i.e. 'Factor 80' schemes: a 60 year old with 20 years of service is eligible to retire but a 59 year old with 20 years of service is not) or 'Freedom 55' type programs offered by many institutions.

118 Report of the World Assembly on Ageing, Vienna, 26 July – 6 August 1982 (United Nations publication, Sales No. E.82.I.16), online: UN Programme on Ageing <http://www.un.org/esa/socdev/ageing>.

119 General Assembly Resolution 48/91 of 16 December 1991.

120 Fourth review and appraisal of the implementation of the *International Plan of Action on Ageing*, online: UN Programme on Ageing <http://www.un.org/esa/socdev/ageing>.

121 For example, Recommendations 18, 19, 20, 21 and 24.

122 Recommendations 1-11.

appropriate home and institutional care services[123], adequate means of transport[124] and income security for older persons [125]. The document also addresses the issue of 'eldercare' and the need to support persons who care for elderly relatives [126]. The *Plan of Action* identifies the unique situation of elderly women and the need to adopt special measures to address the particular disadvantages that many elderly women face[127]. The *Plan of Action* identifies the worldwide prevalence of age discrimination in employment:

> *In most areas of the world, efforts by older persons to participate in work and economic activities which will satisfy their need to contribute to the life of the community and benefit society as a whole meet with difficulties. Age discrimination is prevalent: many older workers are unable to remain in the labour force or to re-enter it because of age prejudice.*

The *Plan of Action* recommends that appropriate measures should be taken to ensure that older workers can continue to work under satisfactory conditions and enjoy security of employment. Moreover:

> *Governments should eliminate discrimination in the labour market and ensure equality of treatment in professional life. Negative stereotypes about older workers exist among some employers. Governments should take steps to educate employers and employment counselors about the capabilities of older workers, which remain quite high in most occupations... The right of older workers to employment should be based on ability to perform the work rather than chronological age.*[128]

The *Plan of Action* also makes a number of recommendations that relate to changing people's attitudes about aging and combating stereotypical views of older persons as being incapable of functioning independently and having neither role nor status in society[129].

The 1991 *Principles for Older Persons* encourage governments to incorporate 18 principles into their national programmes whenever possible. Once again, many of the principles are directly relevant to issues discussed in this paper, in particular access to health care, housing, income support, family and community care, institutional care and social and legal services. Of particular interest are Principles 2 and 3 which affirm that older persons should have the opportunity to

123 Recommendations 13 and 34.
124 Recommendations 18 and 22.
125 For example, Recommendation 36.
126 Recommendations 25 and 26.
127 There are several references to this issue: discussion of the impact of aging on development, Recommendation 27 and 36.
128 Recommendation 37.
129 In particular, Recommendation 50.

work and should be able to participate in determining "when and at what pace withdrawal from the labour force takes place".

*General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons*[130] is less subtle in its reference to the issue of mandatory retirement. It states that parties to the *International Covenant on Economic Social and Cultural Rights* are obligated to pay particular attention to promoting and protecting the economic, social and cultural rights of older persons. Towards that end, state parties should seek to expedite the trend towards elimination of mandatory retirement, one of the "few areas in which [age] discrimination continues to be tolerated"[131]. The Committee also stresses the need for measures to prevent discrimination on grounds of age in employment.

All of the issues that are identified in this paper as being of concern to older persons in Ontario have also been addressed in one or more of the UN documents on aging. Moreover, many of the proposed policy directions in this paper are consistent with the various principles and recommendations developed by the UN to guide countries in the promotion of the rights of older persons. Policy development in relation to age will take into account the international work in this area.

## Analysis and Conclusions

### *General*

Age cases tend to be treated differently than other discrimination cases, particularly where the case involves retirement issues. The most noticeable difference from a human rights perspective is the lack of a sense of moral opprobrium linked to age discrimination which, in comparable circumstances would generate outrage if the ground of discrimination were, say, race, sex or disability.

Stereotypes about older persons are used to justify age discrimination, stereotypes which the courts themselves, in some cases, appear to be supporting[132]. This may be contrasted with the approach taken by the Supreme Court of Canada in the recent BC Firefighters case[133], where the court indicated that impressionistic evidence about what individuals can and cannot do, which is based on gender, will likely be struck down as discriminatory.

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130 United Nations Committee on Economic, Social and Cultural Rights, E/C.12/1995/16/Rev.1 (1995).

131 *Ibid.* at para. 12.

132 See, for example the dissents in *McKinney* and *Stoffman* for criticism of the Supreme Court's approach and the alleged reliance on stereotypes about aging.

133 *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.

***The Significance of Demographics from a Human Rights Perspective***

From a human rights perspective, age demographics are important for several reasons. Firstly, a significant portion of the population (35%) is already 45 years or older and therefore potentially at risk for discrimination on the basis of age. In coming years, as the population ages, the number of people who may experience discrimination on the basis of age in all the social areas covered by the *Code* will increase. As well, as the number of persons over 65 will double and the seniors dependency ratio will sharply increase, mandatory retirement at 65, which is not a form of age discrimination under the *Code*, may have to be revisited. The fact that 6% of seniors continue to be employed after age 65 is very significant as the *Code* only protects against discrimination in employment on the basis of age until age 65.

Finally the statistics indicate the need to consider discrimination in relation to services and facilities. As 7% of seniors live in institutions and seniors tend to be major consumers of health care services, it is important to examine any discrimination issues that arise in relation to services and facilities. Of course, there are other types of services and facilities accessed by seniors as well.

***Employment***

There are strong policy reasons for seeking to reverse attitudes towards age discrimination in the work place. First, the population is aging and longer life expectancies are enabling persons to work productively for longer. Empirical studies do not reveal a consistent relationship between age and job performance[134]. Second, the "lump of labour" notion is a fallacy. Given the vastly different "value added" that is brought to the table by older workers as a function of their experience and acquired knowledge or networks, it is unclear that the strategy of "replacing" older workers with younger workers is possible, let alone effective.

At the broader social policy level, the strain on the public retirement income system will become considerable as the baby boomers start to draw on the system.[135]

Given the fact that aging in Canada is linked to diminishing financial resources and increasing health issues,[136] there are compelling reasons for keeping willing workers in the workforce and, consequently, for ensuring that there are appropriate protections for such workers. There are three distinct policy implications arising out of the employment portion of this paper.

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134 N.C. Agarwal, "Mandatory Retirement and the Canadian Human Rights Act" Research Paper submitted to the *Canadian Human Rights Act* Review Panel, online: Canadian Human Rights Act Review <http://www.chrareview.org/pubs/retire1e.html>.

135 *Flexible Retirement, supra* note 11.

136 See Shone, *supra* note 59.

The first relates to retirement. The constitutionality of maximum age limits for mandatory retirement seems well established and the *Code* itself restricts protection to the age of 65. However, there are still live issues with respect to early retirement schemes that subtly or otherwise seek to reduce the number of older workers in the workforce. The "downsizing defence" therefore has implications for investigations in age discrimination cases. Older workers should not be involuntarily forced out of the workforce through "rejuvenation" schemes, however subtle or carefully implemented. As a result, investigative tools that would assist human rights staff to distinguish between downsizing motivated by legitimate factors and that motivated by age bias would be useful.

In a related issue, and as with other types of discrimination cases in the workplace, the employer frequently advances performance problems or other legitimate reasons for job termination. These may be advanced as a defence alone, or in combination with the downsizing defence. While these reasons may be legitimate, they tend to neutralize or minimize the impact of evidence of age discrimination even if it is found. It should be remembered that all that is necessary to be proven is that age discrimination is one reason for the action, not necessarily the proximate cause. [137]

Strategies should be developed to address these cases, and could include analyses of standard circumstances such as:

- Whether a younger employee replaced an older one in the same or similar job functions; [138]
- Whether the older worker's employment ratings were high, suddenly dropping with no explanation at the time of downsizing;
- Comments that point to ageism;
- Documents or memos that suggest age discrimination, such as announcements of the "rejuvenation" of the workforce;
- Patterns of eliminating older workers;
- Post-downsizing workplace profiles that are considerably younger, coupled with evidence that job descriptions did not significantly change or that new incumbents did not compete for their positions; and
- Impact on the older worker, such as age, salary, and opportunities for comparable employment, should also be considered.

Statistical adverse impact analysis models exist and are used in some jurisdictions. These tools should be explored further to see if they can assist the

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137 *Re Gadowsky*, [1981] 1 W.W.R. 647 (Alta.Q.B.).

138 It is not necessary that the younger worker be considerably younger as long as age was a factor. In one US case, a 56 year old worker successfully sued under the *federal Discrimination in Employment Act* when he was replaced by a 40 year old. *O'Connor v. Consolidated Coin Caterers Corp.* 1996 US LEXIS 2168 (April 1, 1996).

Commission in analyzing downsizing situations.

The third policy issue relates to the aging of the work force coupled with the number of persons who continue to work over 65 years of age.[139] It is difficult to justify a legislative scheme that allows for workers who do continue over 65 years of age to be discriminated against in employment, especially in non-unionized contexts where other protections such as grievance procedures are non-existent. Without any legislative protection related to age, and at a time when so much of the work environment is being influenced by new information technologies, older workers - a growing part of the work force - seem to be particularly vulnerable. One option would therefore be a legislative amendment that would not challenge the right of an employer to impose mandatory retirement at sixty-five, but would allow for the continuation of human rights protection for employees who do continue to work after age 65.

Ontario would not be the only jurisdiction in Canada to have recognized the inequalities of limiting human rights protection to persons less than 65 years of age. In 1998, the British Columbia Human Rights Commission proposed a more far-reaching amendment.[140] The *Canadian Human Rights Act* Review Panel has reviewed the mandatory retirement defence in that Act, including whether the defence should be eliminated altogether in the federal sector. Research prepared for the Review Panel indicates that mandatory retirement may cause major economic and non-economic hardship to those older workers who would have continued to work if they had not been forced to retire. This adverse impact is particularly severe for women and recent immigrants who, because of their career history, may not have sufficient retirement income from public and employer pension plans and personal RRSPs.[141] It should also be noted that in the United States, the federal government has already passed legislation which will result in a phased-in approach that will raise the retirement age from 65 to 67[142]. Accordingly, the trend in other jurisdictions is clearly to re-examine current mandatory retirement policies with a view to bringing them more in line with social realities.

***Services***

Inadequate service levels, particularly in the area of health care, appear to be the

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139 See the section entitled *Seniors and the Labour Force*.

140 British Columbia Human Rights Commission, *Human Rights for the Next Millennium* (19 January 1998), online: British Columbia Human Rights Commission <http://www.bchrc.gov.bc.ca>.

141 From *Mandatory Retirement and the Canadian Human Rights Act, supra* note 134.

142 "Public rejects idea of raising retirement age to save money" *Ottawa Citizen* (6 January 2000). By 2027, Americans will have to be 67 years of age to qualify for social security under a phased-in approach that will gradually raise the retirement age from 65 to 67. The article states that polling indicates that Canadians are strongly opposed to raising the age at which they will be eligible for retirement benefits. The paper raises the U.S. example to show that other jurisdictions are beginning to address the issue of the demographic shift.

result of a health care system focused on restructuring and on investing in acute health care. The needs of older persons are less likely to be met in such a context. For this reason, the Commission could communicate with the Ministry of Health to inquire about the investment in the medium to long term, in chronic care facilities, rehabilitation and complex continuing care.

A second promotional activity would relate to communications with the College of Physicians and Surgeons and the Canadian Medical Association to report the discussion in this paper and to advise physicians that the Commission has taken the position that where differential medical treatment is based on age, this is a form of discrimination unless the criteria are reasonable and *bona fide*, subject to the defence of undue hardship. Moreover, in the case of older persons with disabilities, the higher standard of s. 17 of the Code would require individualized accommodation.

Third, the issue of public transportation is clearly critical to the lifestyle, self-sufficiency and dignity of older persons. It is therefore recommended that the principles adopted as a result of this paper be integrated into the Commission's report on the accessibility of mass transit systems in Ontario.

***Housing***

The Commission's ongoing work in the area of housing and on the ground of disability should reflect accessibility standards and the high standard of the undue hardship defence set out in the Commission's *Guidelines for Assessing Accommodating Requirements for Persons with Disabilities*.

In cases involving elderly complainants with or without disabilities, Commission staff should examine the guidelines provided by the National Advisory Council on Aging as a benchmark in investigations.

**Recommendations**

1. Advocate for the amendment of the *Code* to extend protection against discrimination on the basis of age to workers over the age of 65. In other words, the amended *Code* would still permit employers to impose mandatory retirement at age 65 but, where employers chose not to implement mandatory retirement, workers over the age of 65 would be able to complain of discrimination on the basis of age.

2. Develop a public policy statement on age, supported by community consultation, recognizing independence, participation, care, self-fulfillment and dignity as guiding principles.

3. Develop a public policy statement on 'eldercare', supported by community

consultation, as it relates to grounds in the *Code*. Encourage the Ministry of Labour to include provisions related to 'eldercare' in any revisions to employment standards legislation.

4. Consider the implications of s. 14 of the *Code* and the *Law* decision for schemes that give benefits to persons before they reach the age of 65.

5. Examine the recommendations of the National Advisory Council on Aging and other organizations with respect to barrier-free design in order to incorporate the recommendations in policy work in the area of housing.

6. Incorporate the principles in this paper into the Commission's report on mass transit accessibility in Ontario.

7. Recognize the intersectional implications of age in combination with other grounds involving structural or social disadvantage, notably disability and sex, and integrate these principles into future policy work.

8. Develop analytic tools for Commission staff to assist in distinguishing legitimate downsizing or performance issues from age discrimination.

9. Monitor the proceedings and recommendations of the Elder Abuse Round Table.